

1 William J. Goines (SBN 061290)
 2 Alisha M. Louie (SBN 240863)
 3 GREENBERG TRAURIG, LLP
 1900 University Avenue, Fifth Floor
 4 East Palo Alto, CA 94303
 Telephone: (650) 328-8500
 5 Facsimile: (650) 328-8508
 Email: goinesw@gtlaw.com
 louiea@gtlaw.com

6 Jeremy A. Meier (SBN 139849)
 GREENBERG TRAURIG, LLP
 7 1201 K Street, Suite 1100
 Sacramento, CA 95814-3938
 8 Telephone: (916) 442-1111
 Facsimile: (916) 448-1709
 9 Email: meierj@gtlaw.com

10 Brian S. Cousin (Pro Hac Vice)
 Neil A. Capobianco (Pro Hac Vice)
 11 GREENBERG TRAURIG, LLP
 MetLife Building, 200 Park Avenue
 12 New York, NY 10166
 Telephone: (212) 801-9200
 13 Facsimile: (212) 801-6400
 Email: cousinb@gtlaw.com
 14 capobiancon@gtlaw.com

15 Attorneys for Defendants Polo Ralph Lauren
 Corporation; Polo Retail, LLC; Polo Ralph Lauren
 16 Corporation, doing business in California as Polo Retail
 Corporation; and Fashions Outlet of America, Inc.
 17

18 **UNITED STATES DISTRICT COURT**

19 **NORTHERN DISTRICT OF CALIFORNIA**

20 ANN OTSUKA, an individual; JANIS KEEFE,
 21 an individual; CORINNE PHIPPS, and
 individual; and JUSTIN KISER, an individual;
 22 and RENEE DAVIS, an individual, and on
 behalf of all others similarly situated,

23 Plaintiff,

24 v.

25 POLO RALPH LAUREN CORPORATION, a
 Delaware Corporation; et al.,

26 Defendants.

27
 28 **AND RELATED CROSS-ACTIONS.**

Case No. C07-02780 SI

**MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT OF
 DEFENDANTS' MOTION TO DISMISS
 UNDER RULE 12(b)(6)**

ORAL ARGUMENT REQUESTED

Date: January 18, 2008
 Time: 9:00 a.m.
 Dept: Courtroom 10, 19th Fl.
 Judge: Hon. Susan Illston

Action Filed: May 30, 2006

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. FACTUAL BACKGROUND	1
A. The Individual Plaintiffs Have Distinctly Different Factual Issues.	1
B. The Defendants and Their California Business Operations	2
C. Plaintiffs' Allegations in the Original Complaint and Second Amended Complaint.....	4
III. LEGAL ARGUMENT	5
A. The Legal Standard.....	5
B. Davis's Claims for Fraud and Statutory Wage Violations are Barred by the Statutes of Limitation	5
C. Davis Claims Do Not Relate Back To The Original Complaint	6
1. The Original Complaint Was Founded On Conduct, Transactions Or Occurrences Which Are Distinctly Different From the Conduct, Transactions or Occurrences Related to Davis's Claims.	6
(i) The Original Four Plaintiffs Worked at Retail Stores Under Different Procedures.....	6
(ii) Davis Worked at a Separate Class of Stores under Separate Circumstances.....	9
IV. CONCLUSION	11

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Beesig v. Dolphin Boating & Swimming Club</i> , 683 F.2d 1271, 1278 (9th Cir. 1982)	10
<i>Conley v. Gibson</i> , 355 U.S. 41, 45-46 (1957)	5
<i>In re Syntex Corp. Secs. Litigation</i> , 855 F.Supp. 1086 (C.D. Cal. 1994), <i>aff'd</i> 95 F.3d 922 (9 th Cir. 1996)	10
<i>Oja v. United States Army Corps of Eng'rs</i> , 440 F.3d 1122, 1134 -5 (9th Cir. 2006).....	10, 11
<i>Parks School of Business, Inc. v. Symington</i> , 51 F.3d 1480, 1484 (9 th Cir. 1995).....	5
<i>Phillips v Ford Motor Company</i> 435 F.3d 785, 788 (7th Cir. 2006)	10
<i>Rosenbaum v. Syntex Corp.</i> , 95 F.3d 922, 935 (9th Cir. 1996)	7

Federal Statutes

Fed. R. Civ. P. 12(b)(6)	5
Fed. R. Civ. P. 15(c)	6

State Statutes

Cal. Civ. Proc. Code 338(a).....	5
----------------------------------	---

1 **I. INTRODUCTION**

2 Plaintiff Renee Davis's ("Davis") claims for fraud, wage and hour violations of the
3 California Labor Code and for recovery under the California Private Attorneys Act (California
4 Labor Code section 2699.5), as brought forth in Plaintiffs Ann Otsuka, Janis Keefe, Corinne
5 Phipps, Justin Kiser and Davis's ("Plaintiffs") Second Amended Complaint, must be dismissed
6 because they fail to state a claim upon which relief can be granted. These claims, as detailed
7 below, are barred by the applicable statutes of limitation.

8 Further, Davis cannot gain the pleading benefit of the "relation back" doctrine, as
9 enunciated in Rule 15(c) of the Federal Rules of Procedure, because her claims do *not* arise out
10 of the same conduct, transaction, or occurrence set forth in Plaintiffs' initial Complaint
11 ("Original Complaint"). The Court should grant Defendants Polo Ralph Lauren Corporation,
12 Polo Retail, LLC, Polo Retail Corporation and Fashions Outlet of America, Inc.'s
13 ("Defendants" or "Polo") instant Motion to Dismiss, based on Rule 12(b)(6) of the Federal
14 Rules of Procedure, because even accepting the allegations made by Davis as true, she cannot
15 escape the fact that her time to assert these claims has run.

16 Simply put, Davis no longer has standing to bring forth her claims for fraud, statutory
17 Labor Code violations and for recovery under the California Private Attorneys Act against
18 Defendants.

19 **II. FACTUAL BACKGROUND**

20 **A. The Individual Plaintiffs Have Distinctly Different Factual Issues.**

21 This lawsuit was first filed in the Superior Court for the County of San Francisco on
22 May 30, 2006, alleging multiple class-wide claims for violation of wage and hour laws, breach
23 of contract, fraud, and false imprisonment. The four named Plaintiffs in the original Complaint
24 alleged that they were bringing claims against Defendants individually and on behalf of all
25 others similarly situated against Defendants (*i.e.*, a "putative" class action). The initial Plaintiffs
26 were all former retail sales associates who worked in Ralph Lauren stores in either San
27 Francisco or Palo Alto ("Polo full price stores").
28

1 Otsuka was a sales associate in the Home Collection Department of the Palo Alto store
 2 from approximately May 2004 to October 2004. (Exhibit A, Original Complaint, ¶ 15.) Keefe
 3 was a sales associate in the Men's Department of the San Francisco store from approximately
 4 May 2004 to January 2005. (Exhibit A, Original Complaint, ¶ 44.) Phipps was a sales associate
 5 in the Home Collection Department in the San Francisco store from approximately May 2004
 6 to December 2004. (Exhibit A, Original Complaint, ¶ 24.) Kiser was a sales associate in the
 7 Men's Department of the San Francisco store from approximately July 2004 to August 2005.
 8 (Exhibit A, Original Complaint, ¶ 34.)

9 Plaintiffs then filed a First Amended Complaint in state court on July 20, 2006.
 10 Following substantial discovery, motion practice (including a demurrer which was granted in
 11 part) and removal to this Court, on October 24, 2007 Plaintiffs again amended their Complaint
 12 a second time to add a new Plaintiff, Renee Davis, to "represent" a new class of individuals
 13 (those who were sales associates in Polo Ralph Lauren Factory outlet stores). As alleged in
 14 Plaintiffs' operative Second Amended Complaint ("SAC") and as discussed in detail herein,
 15 Davis was employed as an outlet "associate" at a Polo Ralph Lauren Factory Outlet, located in
 16 Cabazon, California ("Cabazon outlet store") from approximately October 2002 through
 17 February 2004. (SAC, ¶ 57.)

18 **B. The Defendants and Their California Business Operations**

19 Defendants, together, own and operate a number of retail establishments throughout the
 20 United States and world, including Polo full price stores, Polo Ralph Lauren Factory Outlet
 21 ("Polo outlet store"), and other various separate stores.

22 Defendants presently own and operate nine Polo full price stores in California. By way
 23 of background, the Polo full price stores market large ticket items and a selective line of
 24 merchandise that is the premium label for the Polo retail stores. Defendants own and operate 13
 25 separate Polo outlet stores in California. Polo outlet stores are located solely in outlet malls and
 26 the majority of the merchandise represents moderately priced Polo goods not available in the
 27 Polo full price stores. Defendants also own and operate other stores not part of the vertical
 28 retail format of the Polo line of merchandise, and which have not been included in this action.

1 Although Polo full price stores and Polo outlet stores are owned and operated by
2 Defendants, each store is unique and, as a result, maintains different policies, practices and
3 procedures for their business operations. Polo full price stores are located in high-end retail
4 areas that include shopping malls and other retail centers. With the exception of Polo full price
5 stores located in in-door shopping centers, most Polo full price stores have their own separate
6 entrance and exit. Polo full price stores generally hire full-time sales associates who work on a
7 “draw versus commission” structure¹ with most sales associates earning commission
8 compensation as opposed to a draw.

9 The Polo full price stores generally operate on one shift, given the full-time nature of
10 the sales associates it employs, with the exception of stores that have longer store hours that
11 extend beyond eight hours in a day. For those stores, generally there are two shifts that sales
12 associates operate. The typical sales associate in a Polo full price store is a more experienced
13 seller with a career interest in full-time sales and previous work in the industry.

14 Sales associates in the Polo full price stores readily make themselves available to their
15 clients. Sales associates coordinate and schedule their rest and meal breaks with their
16 managers, other sales associates in their department, and according to scheduling demands with
17 clients.

18 Polo *outlet* stores are much different. Had Plaintiffs wanted to include Davis’s claims
19 originally, they could have. The very fact they have amended their Complaint now a second
20 time to add Davis and her new claims speaks volumes as to the inherent differences between
21 Plaintiffs’ Initial Complaint and their current claims.

22 In the Polo outlet stores, typical sales associates are seasonal, part-time, and not career
23 oriented salespersons. There is a substantially larger turnaround rate amongst Sales Associates
24 in the Polo outlet stores from Polo full price stores. The Polo outlet stores experience a high-
25 volume of foot traffic, sales associates are not as focused on developing a book of business, and
26 almost all sales associates in the Polo outlet stores are part-time employees.

27
28 ¹ The Polo full price store located Burlingame, California compensates its Sales Associates on a base plus
commission compensation structure.

1 Polo outlet store sales associates are paid hourly and do not receive commission for
 2 sales. Based on the volume of employees, including sales associates and the hourly
 3 compensation environment, a manager is designated to be on the floor at all times, and referred
 4 to as the Customer Service Manager ("CSR"). The CSR regulates and enforces the schedules of
 5 the Sales Associates on the floor, monitoring their shifts and time on the floor, including rest
 6 and/or meal breaks. Each Polo outlet store sales associate is scheduled to take his/her rest
 7 and/or meal break at a designated time that is scheduled at the start of each business day. Polo
 8 outlet store sales associates do not have flexibility with their schedules.

9 C. **Plaintiffs' Allegations in the Original Complaint and Second Amended**
 10 **Complaint**

11 Plaintiffs' Original Complaint filed on May 30, 2006, asserted causes of action on
 12 behalf of Plaintiffs, individually and on behalf of all others similarly situated against
 13 Defendants. (Exhibit A, Original Complaint). It is organized into several different parts.
 14 Section I (§§ 1-11) alleges Plaintiffs' basis for jurisdiction and venue; Section II (§§ 12-14) is a
 15 summary of the nature of the action; Section III (§§ 15-51) alleges the particular conduct,
 16 transaction, or occurrence which Plaintiffs allege is the basis for their claims they have
 17 asserted; Section IV makes Plaintiffs' class action allegations; Section V asserts each and every
 18 claim on behalf of Plaintiffs (individually or as a whole); and the final sections, Section VI and
 19 VII, include Plaintiffs' prayer for relief and demand for jury trial.

20 Plaintiffs' Second Amended Complaint is organized in the same fashion as Plaintiffs'
 21 Original Complaint. The substance, however, has changed dramatically. As discussed herein,
 22 the most substantive changes made in Plaintiffs' complaint are the additions of Davis as a new
 23 Polo outlet store Plaintiff and the factual allegations she has made, in Section III, regarding the
 24 particular conduct, transaction, or occurrence which form the basis of her claims against
 25 Defendants. From the face of the complaint(s), it is apparent Davis has little in common with
 26 the other prior named Plaintiffs: her allegations differ, her claims arise out of different facts and
 27 occurrences, from a different line of retail stores (Polo full price stores versus Polo outlet
 28 stores) and she lacks sufficient commonality to "relate back" to the Original Complaint.

1 **III. LEGAL ARGUMENT**

2 **A. The Legal Standard**

3 A District Court may dismiss a complaint or any count therein that fails to state a claim
4 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss should be
5 granted when “it appears beyond doubt that the plaintiff can prove no set of facts in support of
6 his claims which would entitle to him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);
7 *Parks School of Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

8 **B. Davis’s Claims for Fraud and Statutory Wage Violations are Barred by the**
9 **Statutes of Limitation**

10 The claims brought by Davis are barred by the applicable statutes of limitation (with the
11 admitted exception of her fifth claim for breach of contract and ninth claim for unfair
12 competition).² As discussed, Plaintiffs have alleged that Davis worked at the Cabazon outlet
13 store from October 2002 to April 2004. (SAC, ¶ 5). Although the Original Complaint was filed
14 May 30, 2006, Davis’ claims were not brought forth until the SAC, which was filed on October
15 24, 2007. Because the claims Davis alleges must be measured against the timing of the filing
16 of the SAC, not the Original Complaint, Davis’ claims must be dismissed as they are barred by
17 applicable statute of limitations.

18 The relevant statutes of limitation for Davis’ claims are as follows: (1) fraud, three
19 years (California Code of Civil Procedure section 338(d)); (2) statutory violations of the
20 California Labor Code, three years under California Code of Civil Procedure section 338(a)
21 (for California Labor Code Sections 510, 204, 221, 201, 202, 203, 226.7, 226, and 232); and (3)
22 three years for violation of the Private Attorneys General Act (California Code of Civil
23 Procedure section 338(a)).

24 Davis terminated her employment with Defendants in or about April 2004, as alleged in
25 the SAC. *She thus should have filed suit against Defendants no later than April 2007* (the
26 three-year anniversary of her termination date from the Cabazon outlet store) in order to seek

27
28 ² These two claims have a four-year statute of limitations under California law and Polo is not challenging the
sufficiency of these claims at the pleading stage.

1 recovery on the fraud and third, fourth, sixth, seventh, eighth, ninth, tenth and twelfth claims
 2 for statutory violations of the California Labor Code. Since Davis failed to timely file suit, each
 3 of these particular claims should now be dismissed.

4 **C. Davis Claims Do Not Relate Back To The Original Complaint**

5 Davis' claims for fraud, violations of the California Labor Code and the Private
 6 Attorneys General Act are barred by applicable statutes of limitation in that she failed to assert
 7 her claims within three years of the termination date of her employment with Defendants.
 8 Although the Federal Rules, and in particular Rule 15(c) of the Federal Rules of Civil
 9 Procedure, provide for the "relation back" of amendments to the date of the original filing,
 10 there are certain requirements that must still be met for the complaint to be viable.

11 Rule 15(c) requires that an amendment to a pleading relates back to the date of the
 12 original pleading when:

- 13 (A) the law that provides the applicable statute of limitations allows relation
 14 back;
 15 (B) the amendment asserts a claim or defense that **arose out of the conduct,**
 16 **transaction, or occurrence** set out -- or attempted to be set out -- in the original
 17 pleading.

18 Fed. R. Civ. P. 15(c) (emphasis added). Since Davis' claims against Defendants for fraud,
 19 violations of the California Labor Code and the Private Attorneys General Act are barred by
 20 three year statutes of limitation, Davis' claims can only survive if it is determined that her new
 21 claims arise out of the same conduct, transaction or occurrence set forth in the Original
 22 Complaint.

23 **1. The Original Complaint Was Founded On Conduct, Transactions Or**
 24 **Occurrences Which Are Distinctly Different From the Conduct,**
Transactions or Occurrences Related to Davis's Claims.

- 25 (i) **The Original Four Plaintiffs Worked at Retail Stores Under**
 26 **Different Procedures.**

27 An amendment adding a party plaintiff relates back to the date of the original pleading
 28 only when: 1) the original complaint gave the defendant adequate notice of the claims of the

1 newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and
2 3) there is an identity of interests between the original and newly proposed plaintiff.

3 *Rosenbaum v. Syntex Corp.*, 95 F.3d 922, 935 (9th Cir. 1996). In *Rosenbaum*, Plaintiffs were
4 seeking to “expand the class” and the Court ruled there was no equitable tolling for non
5 asserted class members.

6 As discussed herein, Plaintiffs’ Original Complaint (Section III, ¶¶ 15-51) sets forth the
7 specific conduct, transaction, or occurrence which forms the basis for Otsuka, Phipps, Kiser
8 and Keefe’s initial claims against Defendants. Those factual allegations, however, are distinct
9 from the factual allegations that Davis now alleges in the SAC. (SAC, ¶¶ 57-64). In particular,
10 the factual allegations by Davis in the SAC differ in the nature of the specific acts and conduct
11 causing harm, the status of the separate employees, and the varied circumstances distinguishing
12 Polo full price retail stores from Polo outlet stores.

13 Otsuka, a Sales Associate in the Home Department of the Palo Alto Polo full price
14 store, has alleged her injuries based on the actions of the store management in the Palo Alto
15 store. (Exhibit A, Original Complaint, ¶¶ 15-23). In particular, she alleges that the store’s
16 General Manager, Tin Hua, explained her compensation structure and how she was a draw
17 versus commission employee. (Exhibit A, Original Complaint, ¶ 16). Otsuka further alleges
18 that Phoebe Morales, the store manager, and Ha’aheo Zablan, Home Collection/Men’s
19 Manager, acknowledged their lack of understanding about the arrearages program. (Exhibit A,
20 Original Complaint, ¶ 16). The specific conduct, transaction, or occurrence which forms the
21 basis for Otsuka’s claims regarding failure to pay premium overtime, her work off-the-clock,
22 and rest and meal break violations are all based on actions that took place solely in the Palo
23 Alto full price store. (Exhibit A, Original Complaint, ¶¶ 21-23).

24 Phipps, a Sales Associate in the Home Department of the San Francisco full price store,
25 alleges injuries based on the actions of the store management in the San Francisco store.
26 (Exhibit A, Original Complaint, ¶¶ 24-33). In particular, she alleges that the store’s General
27 Manager, Tin Hua, explained her compensation structure and how she was a draw versus
28 commission employee. (Exhibit A, Original Complaint, ¶ 25). Phipps further alleges that

1 Theresa Cruz, Operations Manager and Valerie Harrison, Department Manager, clocked her out
2 while she was still performing work. (Exhibit A, Original Complaint, ¶ 30). Phipps also alleges
3 that Theresa Cruz fraudulently manipulated her time records. (Exhibit A, Original Complaint, ¶
4 30). Valerie Harrison and Theresa Cruz, as alleged by Phipps, stated that if Phipps tried to
5 leave the store before she had been inspected an alarm would sound and she would or could be
6 terminated. (Exhibit A, Original Complaint, ¶ 31). Phipps also alleges that her managers in the
7 store harassed her and her co-employees when she attempted to take breaks. (Exhibit A,
8 Original Complaint, ¶ 33). The specific conduct, transaction, or occurrence which forms the
9 basis for Phipps' claims regarding failure to pay premium overtime, her work off-the-clock,
10 and rest and meal break violations are all based on actions that took place solely in the San
11 Francisco full price store

12 Kiser, a Sales Associate in the Polo Men's Department and Men's Sport Department of
13 the San Francisco Polo full price store, also alleges his injuries based on actions of the store
14 management in the San Francisco Store. (Exhibit A, Original Complaint, ¶¶ 34-43). In
15 particular, Kiser alleges that the store's General Manager, Tin Hua, explained his compensation
16 structure and how he was a draw versus commission employee. (Exhibit A, Original
17 Complaint, ¶ 35). Kiser further alleges that Theresa Cruz, Operations Manager, would write
18 down the hours he worked by fraudulently manipulating his time records. (Exhibit A, Original
19 Complaint, ¶ 39). Managers Rosalinda Walwork and Theresa Cruz, as alleged by Kiser,
20 harassed him and his co-employees when they attempted to take rest breaks. (Exhibit A,
21 Original Complaint, ¶ 42). The specific conduct, transaction, or occurrence which forms the
22 basis for Kiser's claims regarding failure to pay premium overtime, his work off-the-clock,
23 false imprisonment, and rest and meal break violations are all based on actions that took place
24 solely in the San Francisco full price store

25 Keefe, another Sales Associate in the Polo Men's Department and Men's Sport
26 Department of the San Francisco Polo full price store, has similarly alleged her injuries based
27 on the actions of the store management in the San Francisco Store. (Exhibit A, Original
28 Complaint, ¶ 44-51). In particular, she alleges that the store's General Manager, Tin Hua,

1 explained her compensation structure and how she was a draw versus commission employee
 2 (Exhibit A, Original Complaint, ¶ 45). Further, Keefe alleges that the managers in her store,
 3 including Theresa Cruz, clocked her out while she was still performing work. (Exhibit A,
 4 Original Complaint, ¶ 49). On other occasions, managers, including Theresa Cruz, would write
 5 down the hours she worked by fraudulently manipulating her time records so they would reflect
 6 less time worked. (Exhibit A, Original Complaint, ¶49). Keefe alleges she was instructed by
 7 Theresa Cruz and Tin Hua that she was not to use the customer exit to leave the store and that if
 8 she tired to leave through the employee exit prior to being inspected she would be terminated.
 9 (Exhibit A, Original Complaint, ¶ 50). The specific conduct, transaction, or occurrence which
 10 forms the basis for Keefe's claims regarding failure to pay premium overtime, her work off-
 11 the-clock, and rest and meal break violations are all based on actions that took place solely in
 12 the San Francisco full price store

13 These operative factual allegations, as alleged by Otsuka, Phipps, Kiser and Keefe, are
 14 alleged in the Original Complaint as the specific source of each of the Plaintiffs' injuries, and
 15 give rise to their instant claims. On the other hand, at this late date Davis attempts to set forth
 16 different fact allegations arising out of different conduct, transactions or occurrences.

17 (ii) Davis Worked at a Separate Class of Stores under Separate
 18 Circumstances.

19 Davis has alleged that her claims arise out of conduct, transactions or occurrences that
 20 took place in the Cabazon *outlet* store, where she alleges she was a sales associate. (SAC, ¶¶
 21 57-64). Davis alleges that her store's general manager and Human Resources Department
 22 Manager, April Hicks, informed Davis her hourly rate of compensation and that she was not
 23 permitted to discuss her wages with other employees. Davis underwent loss prevention
 24 inspections and attended morning meetings at her store, which she alleges she was not properly
 25 compensated for. (SAC, ¶ 60).

26 Davis's managers and supervisors locked the store's exit door and required Davis to
 27 clock out and then wait at the store exit for inspection, prior to being able to leave the store.
 28 (SAC, ¶ 61). Davis attended morning meetings in the store that she was not compensated for.

1 (SAC, ¶ 62). During sales and holidays, Davis alleges she was not always permitted to take rest
2 breaks because there were not enough sales associates on duty to assist customers.

3 In this instance, therefore, Plaintiffs seek to expand the class to now include a new *outlet store*
4 class representative, one whose alleged wrongs inherently arise from different facts and
5 circumstances. There is an insufficient factual basis, from the pleadings alone, to allow Davis
6 to “piggyback” on the other Plaintiffs’ original claims.

7 Unrelated Plaintiffs cannot join a pending action and avoid the statute of limitations. “Unless
8 the substituted and substituting plaintiffs are so closely related that they in effect are but one, an
9 amended complaint substituting plaintiffs relates back only when the relief sought is
10 sufficiently similar to constitute an identity of interest.... The amendment ... relates back only
11 if appellants can show an identity of interest.” *Beesig v. Dolphin Boating & Swimming Club*,
12 683 F.2d 1271, 1278 (9th Cir. 1982).

13 “Notice from a previous complaint seldom is adequate when substituting plaintiffs,
14 unless the change merely brings in the real party in interest or accomplishes some similar
15 technical result. New, unrelated plaintiffs generally are unable to assert a cause of action
16 sufficiently confined to the facts stated in the original pleadings to support an inference of
17 adequate notice. Defendants usually are prejudiced by the different identity of plaintiffs, if by
18 nothing else.” *Id.* While “routine substitution” of a new class representative may be allowed
19 under a relation back theory and tolling principles, Plaintiffs do not seek a “routine”
20 substitution of a new class representative to replace a disqualified or substituted same class.
21 *See Phillips v Ford Motor Company*, 435 F.3d 785, 788 (7th Cir. 2006). Davis was added to
22 seek redress for an entirely new class or subclass of persons, precluding the application of the
23 relation back theory to Plaintiffs’ benefit. *In re Syntex Corp. Secs. Litigation*, 855 F.Supp.
24 1086 (C.D. Cal. 1994), *aff’d* 95 F.3d. 922 (9th Cir. 1996).

25 Further, the very fact that Davis included in the SAC new allegations regarding the
26 conduct, transaction, or occurrence upon which she has based her claims is evidence in and of
27 itself of the manifest *differences* from the Original Complaint. *Oja v. United States Army Corps*
28 *of Eng’rs*, 440 F.3d 1122, 1134 -5 (9th Cir. 2006). The *Oja* court dismissed a second amended

1 complaint for similar reasons. The *Oja* plaintiffs' first amended complaint sought relief against
2 the defendant for disclosure of his personal information on defendant's website. (*Oja*, at 1134).
3 Soon after, plaintiff filed a second amended complaint which alleged claims for a second
4 disclosure by defendant that occurred on a separate website. *Id.* At issue for the Ninth Circuit
5 was whether the relation back doctrine would apply to the claims brought forth by the plaintiff
6 in the second amended complaint which would otherwise be barred by the statute of
7 limitations. *Id.* at 1134-5.

8 The Ninth Circuit, in upholding the finding of the District Court that the second
9 amended complaint in *Oja* did *not* relate back, determined that the claims brought by plaintiff
10 for disclosure of personal information were "based on the acts of disclosure themselves, each of
11 which is distinct in time and place, if not substance" *Id.* at 1135. As with the varied allegations
12 about the Polo retail and outlet stores and procedures, the allegations as to time, place and
13 manner are distinct and different. The Davis claims arise out of a completely different set of
14 facts and circumstances, those pertaining to Polo outlet store in Cabazon. Her claims have no
15 similarity to whatever may have occurred in the Palo Alto or San Francisco full price retail
16 stores, as alleged by Plaintiffs Otsuka, Phipps, Kiser and Keefe in the Original Complaint.

17 Therefore, where, as in the instant case, an amendment alleges a separate violation of
18 the same statute or contract, it remains subject to the applicable statute of limitations if based
19 on different conduct, transactions or occurrences. *Id.* Davis should have brought her claims
20 within the appropriate time. They are now barred by the statutes of limitation.

21 **IV. CONCLUSION**

22 Davis's claims do not relate back to the filing of the Original Claim and her untimely
23 claims for Fraud, Violations of the California Labor Code and the Private Attorneys General
24 Act should be dismissed with prejudice.

25 //

26 //

27 //

28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: November 13, 2007. GREENBERG TRAURIG, LLP

By: /s/ William J. Goines
William J. Goines
Jeremy A. Meier
Alisha M. Louie

Attorney for Defendants Polo Ralph Lauren Corporation; Polo Retail, LLC; Polo Ralph Lauren Corporation, doing business in California as Polo Retail Corporation; and Fashions Outlet of America, Inc